FARAD CONTINUATION SHEET

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 915 OF 2004

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders

Shri S.S. Haldikar, advocate for the Appellants.
Shri P.D. Dalvi, advocate for Respondents.

CORAM: A.S. OKA, J.
DATE : 24th August, 2004.

P.C.:-

1. Heard learned counsel appearing for the parties.

2. The appeal is filed by the Original Defendant. Suit was filed by the Respondents by making out a case that the Appellant was inducted in the suit premises by mortgagee and the Appellant has no right to occupy the suit premises. The Courts below have passed a decree in favour of the Respondents.

3. Mr. Haldikar appearing for the Appellants submitted that intitial burden was on the

Respondents to prove that the Appellant was inducted as a tenant by the mortgagee. He submitted that as the said burden was not discharged, it was not necessary for the Appellant to prove that he was the tenant in respect of the suit property inducted by the original owner of the mortgaged property. He submitted that when a specific case was made out by the Appellant that his father was the tenant in respect of the suit property and other legal representatives of the father of the Appellant were not impleaded as party Defendants, an issue ought to have been framed by the Trial Court regarding the effect of non-joinder of necessary parties. He submitted that the said aspect is not considered by the Appellate Court.

4. In sofar as the first submission is concerned, the case of the Respondents Plaintiffs was that the Appellant has no right to occupy the suit property. By way of defence, the Appellant contended that he has the right to occupy the property as legal representative of

his father who was the original tenant inducted by the owner of the property. Therefore it was for the Appellant Defendant to establish his case of tenancy. The courts below found that except for producing certain rent receipts issued only by the mortgagee, no other evidence of tenancy was produced by the Appellant. Therefore a finding of fact was recorded by the Courts below that the Appellant failed to prove that he has been inducted in the suit property by the Respondents owner. No fault can be found with the approach of the courts below if a finding was recorded that the Appellant has failed to prove that he was the tenant inducted by the Respondent owner and therefore Decree for possession was required to be passed in favour of the Respondents.

5. As far as the second contention is concerned, the Judgment of the Appellate Court shows that the same was not raised before the Appellate Court. Therefore the said contention cannot

be raised for the first time in the Second Appeal. There is no merit in the Second Appeal and the same is dismissed with no orders as to costs. At this stage Shri. Haldikar for the Appellant submitted that considering the fact that the Appellant is in possession of the suit property for a long time and as he is residing in the suit property, time of one year be granted to vacate. The said request is opposed by the learned counsel for the Respondent.

6. Considering the fact that the Appellant is residing in the suit property which consists of three rooms, a case is made out for grant of time to vacate. Notwithstanding the dismissal of the Appeal, it is directed that decree for possession shall not be executed till 31st May, 2005 subject to Appellant and all his adult family members filing usual undertaking to vacate in this Court within a period of three weeks from today. If the usual undertaking is not filed within the stipulated time, the

decree for possession will become executable forthwith.

7. All concerned to act on a copy of this order duly authenticated by the Court Sheristedar/Court Stenographer.

Sd/-

JUDGE